07 Civ. 8813 (RWS)

DECLARATION OF
JOHN A. ORZEL IN OPPOSITION TO DEFENDANT'S M OTION TO VACATE
MARITIME ATTACHMENT

Exhibit R

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

GALVESTON DIVISION

PROSHIPLINE, INC. AND EP-TEAM, INC.	§	CASE NO. 4:07-CV-4170
VERSUS	§	GALVESTON, TEXAS
M/V BELUGA REVOLUTION AND ASPEN INFRASTRUCTURES LTD	§	APRIL 30, 2008 10:01 A.M. TO 10:21 A.M.

OPPOSED MOTION FOR ENTRY OF FINAL JUDGMENT AND MOTION FOR RECONSIDERATION

BEFORE THE HONORABLE JOHN R. FROESCHNER
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR PLAINTIFFS: SEE NEXT PAGE

FOR DEFENDANTS: SEE NEXT PAGE

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GALVESTON, TEXAS; APRIL 30, 2008; 10:01 A.M.

THE COURT: For the record, this is Houston Civil Case, 2007-4170, P*roshipline versus M/V Beluga and others*.

Can I get appearances for the record? Who's here for the plaintiffs?

MR. ROMNEY: Mark Romney for the plaintiffs, as well as Andy Schreck.

THE COURT: Okay. Thanks for coming by.

MR. LETOURNEAU: Good morning, Your Honor. Keith Letourneau for defendants, Aspen Infrastructure Ltd.

THE COURT: Okay. I've read through your submissions but I guess my first question is: Isn't this whole thing moot because the bunkers are gone?

MR. SCHRECK: May I address that, Your Honor?

THE COURT: Yeah.

MR. SCHRECK: Andy Schreck. Ordinarily it would be, Judge. The ship's long gone; there's nothing to attach. The problem is, a result of what I would call the presence finding in the Court, there's been a domino effect in other districts around the country. And what's happening -- what Keith's client has done, which is what I would do, is they've taken this presence finding and used it to defeat attachments that we've attempted in Washington and in New York.

THE COURT: How does that work? I was curious.

I've read that and I thought: What difference does it make if there's a general agent in the Southern District of Texas playing a seizure in New York?

MR. SCHRECK: Judge, we're baffled by it as well.

(Laughter)

MR. SCHRECK: And those cases are going up for that reason on appeal. But what we're concerned about is we represent a Texas -- a couple of Texas companies. We have an Indian foreign defendant and we may never get our money if we win in an arbitration unless we protect the right to attach. And that's why -- that's why we're down here taking up the Court's time this morning.

THE COURT: Yeah, but I mean, what do we accomplish? Because isn't -- You're welcome to sit down, please. I mean isn't the presence of a general agent sort of a snapshot situation? You either have one or you don't at the given time that the rule of the attachment is placed. So the fact that I found that Mr. Gutierrez was the agent on a specific day, if he's no longer the agent because of SE Shipping, whatever the other boatman is, then it doesn't have any impact. I mean, it doesn't have staying power. It's not like you can't seize another ship if you make a diligent effort to find out whether Gutierrez is still the general agent or not; does it?

MR. SCHRECK: I believe that's correct, Your

Honor.

THE COURT: Okay.

MR. SCHRECK: What we're trying to do is -- we're focused really on the Washington and New York actions right now. Because we did seize assets in both those cases and I believe they've both been dissolved.

THE COURT: Weren't they dissolved on an executory contract doctrine more so than on the presence of a general agent in the Southern District of Texas?

MR. SCHRECK: I couldn't tell which way those judges gave more weight to, Your Honor, honestly.

THE COURT: It sounded like it was more on the executory contract doctrine but again, I guess, I'm getting back to: If I were to -- Well --

MR. SCHRECK: I think I see -- I read your mind, Judge. What I --

THE COURT: Yeah. What's the order you want me to address if you win?

MR. SCHRECK: What I've talked to Mr. Romney about -- and I did mention this to Keith -- is we just want -- we'd like to finish our bite at the apple. I think at the hearing we -- my sense is we started it but because of the relationship between Aspen, Suzlon, Marko Trans [sp.ph.], and this company called SE Shipping, I don't think it's really clear and hence, I'm not sure it's clear who

General Maritime [sp.ph.] was really working for on December 7 when this lawsuit was filed.

We would like to ask the Court to reopen the record for a limited time for limited discovery on that point which would probably be the deposition of Mr. Gutierrez with him producing documents to look at. And it may be or it may not be the deposition of Mr. Bangad, who's the general manager of Suzlon just to figure out who exactly Gutierrez was working for on December 7 because I'm not sure that's clear.

THE COURT: Yeah, but I guess I'm -- Where does that get me other than wasting my time?

MR. SCHRECK: Judge, I think it just would --

THE COURT: I mean, what do we get -- at the end of the day, what do we get? We get us finding that, oh Froeschner was wrong, Gutierrez wasn't a general agent but we already get a general appearance by the defendants in this case. The fact that I would make that determination doesn't get the bunkers back because they're just in the ozone now, I guess, because that's what they were, was fuel.

So, it just what? Defeats this one finding so that you can go around the country and say that hasn't been there. I mean, what do we accomplish by doing that, I guess, except spending a lot of money and time to get nowhere because this is an arbitration case so it obviously

can't be litigated here. It's over for the most part, I think.

MR. SCHRECK: Well, the attachments are critical, Your Honor, the ability -- We're still struggling to get into the same arbitration with Aspen and EP-Team, that is, Proshipline is. And I won't go into that unless the Court asks. But as to what -– as to –- I don't think it would be a waste of your time, Judge, because we're not saying you got it wrong; we're just saying that additional facts need to be developed that weren't at the time.

Now, did we have a chance to cross examine Mr. Gutierrez? Yes, we did. But, Judge, as you know the Rule B proceeding is quick. We don't have as many documents as you would with ordinary discovery. And this is an unusual case in that the presence finding here being relied on by those trial judges out of state to defeat those attachments and we would like to be able have you reconsider that with the additional information and then take it back to those courts and say -–

THE COURT: Do you agree with my observation that it's wrong for the Washington court and the New York court to make a determination about whether a general agent in the Southern District of Texas has any impact on those Rule B attachments there? I mean, I don't understand what the judge was saying that the facts that they could be found in

Texas has anything to do with the Southern District of New York Rule B attachment. Does that -- That doesn't make any sense to you; does it?

MR. SCHRECK: It doesn't, Judge.

THE COURT: Okay.

MR. SCHRECK: But the risk is, especially in the Second Circuit, where the lost -- the *Aqua Stolley* [sp.ph.] case and others were hard to understand --

THE COURT: Yeah. Yeah.

MR. SCHRECK: The risk is that the fact that plaintiff and defendant are both present here may be determinative in that attachment action in New York even on appeal. I don't understand it.

THE COURT: Yeah, I don't understand that either. And if we're right about that and if on appeal they find -- well, I guess, there are other problems there. They're probably never going to reach that issue, but -- Well, okay.

Then, assuming this really is a 60B motion, and I guess it is because the bunkers are gone and so that's -- even though we still got the lawsuit pending, I think there's some case law that says that would be a collateral appeal order had you asked me to withhold the vacature order, then isn't Mr. Letourneau's position that this isn't really discovered evidence pretty much against you, the SES involvement? Because you knew about it with

the email and also there really isn't any newly discovered evidence that would --

I guess what I'm saying is: If we assume the Rule 60B standard applies as opposed to this just being an interlocutory order that we could revisit at any time, then the Rule 60B standard requires that you show there's newly discovered evidence that you could not with due diligence have found out about before the hearing, but you have that email that told you that SE Shipping was now involved; wasn't that the issue you were saying was newly discovered that it impacts on my decision?

MR. SCHRECK: Yes, sir, that's correct. In our two -- there are two basis under Rule 60. I mean there are really two proposals I would make, Your Honor. One would be to keep the status quo as to your prior order, Judge Rosenthal's order if we can, reopen the record for a limited discovery and then come back and re-continue this hearing unless Keith and I set the depositions and hear the same thing and we conclude it's a waste of time and you win. Or pursue this as a Rule 60B(2) newly discovered evidence to Rule 60B(6), which is the extraordinary circumstance rule -- or unusually circumstance rule.

You're right, Judge. We had that email about SE but what was not clear until you read Mr. Bangad's affidavit was that SE Shipping, and understand Keith's

argument that it's unclear when SE took over the chartering or got involved, I agree with that. All I'm asking is let's figure that out. Let's see some documents. Let's see some charter parties. Let's see some sub-charter parties. If they're right and in December of 2007 it wasn't SE Shipping or there was a connection between General Maritime and Aspen then we ought to lose.

THE COURT: What would be the unusual circumstances that would pigeonhole you in the B(6)?

MR. SCHRECK: Your Honor, I acknowledge that it takes a lot. I mean, I've read the cases. It's hard to find any where courts that have granted relief under that section. The only thing I would assert would be in terms of equities is the use of the presence finding here in these other districts to defeat those attachments. That's part in parcel of an ongoing fight we've got with them about the arbitration. It's just we can't get any relief.

THE COURT: Right. But I think in a way I'm just saying, okay, maybe if I have to consider that somewhere down the line, I'm really just doing that as an accommodation to you people so that you can say, that's not in existence anymore. But it really doesn't -- it doesn't get us anywhere in our lawsuit here; does it? It just gets you in a better position in other lawsuits in other jurisdictions if and when they raise it at some point in

time.

MR. SCHRECK: As a practical matter, that's right, Judge. We change what the order says; we're not getting any relief here.

THE COURT: That's what I mean.

MR. SCHRECK: That's right.

THE COURT: So, okay.

MR. SCHRECK: And for that reason there's not any –- I don't think there's any prejudice to Aspen. There's no ship around or no property to attach.

THE COURT: Well, their money. They have to go to depositions in Indiana and things like that.

MR. SCHRECK: Sure. I don't mean to belittle that. I'm just -– As far as any risk of us grabbing their property, that's gone.

MR. LETOURNEAU: Judge, may I respond?

THE COURT: Yeah, sure.

MR. LETOURNEAU: In a variety of respects, I would have to respectfully disagree with my opponents.

THE COURT: Sure.

MR. LETOURNEAU: Judge, in New York as well as in Washington, they have both found that these were executory contracts and consequently they don't fall within admiralty jurisdiction. Mr. Romney and Mr. Schreck have made the argument that Aspen has taken inconsistent positions in New

York with respect to the existence of admiralty jurisdiction. In fact, Aspen has taken an entirely consistent position because they had claims, (indiscernible) and freight.

So admiralty jurisdiction does exist in New York. Whereas the executory contract for future damages doesn't fall within admiralty jurisdiction. And because of that those courts have now found that, there's no basis for this action to proceed. They are collaterally estopped or res judicata applies to bar any future litigation with respect to these claims. While I cited to you the provisions of the Western District of Washington decision relating to presence within the jurisdiction, I did so because they essentially adopted the deal with respect to general maritime and it probably just dovetails with the decision you had previously made. But we make no representations about EP-Team's presence in this district.

The *Aqua Stolley* decision with respect to presence is a basis for the Second Circuit and the Southern District of New York to find that maritime jurisdiction doesn't exist there because the parties allegedly are present here. We take no position with respect to EP-Team being present here on that *Aqua Stolley* decision.

But that's not the underlying basis which we contest any future activity here. Ours is twofold: one is

they're collaterally estopped because of decisions in New York and the Western District of Washington on executory contract theory; and two, the SE Shipping information was available to them. It was available in July of '07. They had the opportunity to examine Mr. Gutierrez at length in this court. Then, Mr. Bangad issued that affidavit which was still consistent with the previous information that was provided and they had the opportunity to submit that to Judge Rosenthal before she issued her order on the evaluation of your decision as to vacating the writ of attachment.

So, from your prospective, we don't see that there's any basis to continue the proceedings here and we don't want to do that, frankly.

THE COURT: What's your –- what's your thoughts about this all being moot?

MR. LETOURNEAU: I'm sorry?

THE COURT: What are your thoughts about this all just being rendered moot by the fact we vacated the Rule B attachment and the Rule B attachment was on bunkers which, I think, are just fuel; right? Which is now just been burned and it's gone and that property no longer exists.

MR. LETOURNEAU: Well, Judge, I agree with that. I mean, the fact of the matter is there is no property to be seized. It was a writ of attachment for the Beluga

Revolution's bunkers and that vessel is not here. It is moot for all practical purposes. If they file suit again, then the basis would be -- they would have to establish that we're not present within the district again if there's no vessel that comes in.

THE COURT: But it would be against other property; it wouldn't be against this property?

MR. LETOURNEAU: It would be against other property, not this property.

THE COURT: Yeah. Do you think this is a Rule 60B situation?

MR. LETOURNEAU: No, Judge, I don't for the reasons I just stated, and that is that that information concerning SE Shipping was available to them and they had the opportunity --

THE COURT: No, no. I mean, do you think we should review it under the standard as if it's asking for Rule 60B relief?

MR. LETOURNEAU: Again, I think under Rule 60B the only criteria that they could possibly meet would be --

THE COURT: No, that's not -- I'm sorry, Keith. Do you think that the order that Judge Rosenthal entered adopting my report and recommendation is a collateral order that therefore should be treated under Rule 60B?

MR. LETOURNEAU: Under Rule 60B.

THE COURT: Or is it just an order that was issued by the Court while the case is still pending because the case is still pending which the Court can review anytime it wants without hardly any standard at all?

MR. LETOURNEAU: No, Judge. I do -- In that respect, I do believe it's 60B and the reason for that is because the order vacating the writ essentially disposed of the case.

THE COURT: That's what I think, too. I think it's a 60B situation and I don't think we've got newly discovered evidence.

And as you were saying, Mr. Schreck, B(6) paragraph is pretty tough to get relief in. And the relief you're asking for again, just sort of seems to me to be and accommodation to your people which, you know, I mean it would be nice if I could do it for you, but I'm not sure it advances this litigation to any degree at all.

But I'll listen to anything more you want to say about it.

MR. SCHRECK: Well, I think you essentially have your mind made up, Judge, but one element that I point to and I did -- I filed a supplemental brief and I provided a copy to Keith in a case called *U.S. versus Orange Parish School Board* [sp.ph.] out of the Fifth Circuit. One of the elements in the Rule 60B(6) consideration is the risk that

denying relief will produce injustice in other cases. And justice is in the eye of the beholder obviously and this is not life or death.

But we do think that these other courts have seized on the presence finding here unfairly and incorrectly and, you know, the issue of whether reopening the record or the citing this as a Rule 60 eventually will be moot as to this case but the effect of the decision is going to be -- is being relied on by these other two courts in causing the expenditure of a lot of money and time that we would like to stop and undo by reopening the record and submitting the additional information to you.

In fair -- I mean, did we know about SE Shipping with that email? Sure we did. Did we know -- but do we know about the relationship as of December 2007? No. I wasn't at the hearing but I don't think there were any documents brought to you in terms of charter parties or emails or letters or faxes in December, November, that in time frame that showed who General Maritime was working for at that time.

So there was nothing for us to submit to you or Judge Rosenthal. There's still not until we have a chance to explore that.

THE COURT: But if it's a Rule 60B situation and that standard applies, then the Court doesn't have the

authority to just reopen the record; does it?

MR. SCHRECK: I don't believe you do, Judge, and that's why at the outset I stated, more or less, in the alternative that if you consider Rule 60, we believe we've met the standards. If it's not Rule 60 and it's more in the nature of interlocutory decision, we would ask that the record be reopened for a limited time for the discovery as we discussed.

THE COURT: But I think it's Rule 60B because of the mootness issue and because the property is gone and there's nothing we can do to remedy that no matter how many times we reopen the record. I mean, there's really not much we can do. The bunkers are gone. That's -- Okay.

Now, I'm just curious about something because it was probably off the mark and if you don't want to talk about it, just tell me. But if these are executory contracts then it's my understanding that they probably could -- they could probably lead to an attachment if there was money that was still owed to you for work you've already done.

Is that a claim in this lawsuit or are you just making a claim for property [sic] that you -- for profits that you are not going to get because the contract was breached?

MR. SCHRECK: It's the latter, Judge, because the

power services have been paid for. But as to the executory contract issue, the Supreme Court addressed this, at least indirectly, in *North Exceller versus Kirby* [sp.ph.], the focus being on what is the nature of the services of the agreement. That's the only issue, not what the damages are. And I think eventually that's going to get briefed and looked at by the Ninth Circuit and the Second Circuit in these cases we've alluded to, but we strongly disagree with that executory contract theory.

THE COURT: Okay. Okay. It looks like it's pretty inviting to me if I were the judge and we were dealing with it. But I'm still not sure that even if they find that you could attachment for money that was owed, I'm not sure you could ever get your anticipated profits -- Well, whatever. I guess that's off the mark. But anything else you want to say before we close this record?

(Laughter)

MR. SCHRECK: No, Your Honor, not at this time.

THE COURT: Okay. Keith?

MR. LETOURNEAU: Nothing else, Judge.

THE COURT: Okay. Well, I'll see if should change Judge Rosenthal's mind and I'll let you know. Okay. Thanks.

(This proceeding was concluded at 10:23 a.m.)

/s lvmartin

BY: JUDICIAL TRANSCRIBERS OF TEXAS, INC.

OWNER: LISA A. DICKSON

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MAY 15, 2008

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